IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 234

G. F. ALBIN,

Petitioner,

v.

COWING PRESSURE RELIEVING JOINT COMPANY, an unincorporated company, etc., et al.,

Respondent.

REPLY BRIEF FOR PETITIONER.

LEWIS E. PENNISH,
Counsel for Petitioner
110 South Dearborn Street
Chicago, Illinois

THOMAS S. MCCABE,
Of Counsel.

U. S. Law Printing Co., Phone Lakeview 6581, Chicago, Illinois

INDEX

AUTHORITIES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 234

In the Matter of

COWING PRESSURE RELIEVING JOINT COMPANY, an Unincorporated Company or Association,

An Alleged Bankrupt.

REPLY BRIEF FOR PETITIONER.

Respondent makes three points in its brief. Each of them is without merit.

I.

Respondent says that the restraining order should not have been entered in the bankruptcy court because the proceeding entitled "*Felix B. Kilbride, as Administrator with the will annexed of the Estate of Michael Masterson, deceased*, Plaintiff, v. *Peter Masterson, et al.*, Defendants, No. 34S 18698 in the Superior Court of Cook County" was

not a case which was brought and prosecuted *against* the bankrupt but was a case which was brought and prosecuted *by* the bankrupt (Respondent's Brief, pp. 3, 5, 13-17).

There is no merit to this contention. The sworn petition for restraining order upon which the restraining order of February 21, 1942 was based alleged that there were two cases pending against the bankrupt: (1) the proceeding in the Superior Court of Cook County aforesaid, and (2) a suit by the National Lead Company for approximately $2,500 pending in The Municipal Court of Chicago (R. 8-9). The allegations of the sworn petition for restraining order with regard to the proceedings in the Superior Court of Cook County were that

> "in said proceedings the said Thomas Hart Fisher filed certain counterclaims alleging that instead of being indebted to the said debtor in the various sums claimed that the alleged bankrupt is indebted to said Fisher after all just deductions and credits in a sum which your petitioner is informed will exceed approximately $1,000" (R. 8).

Respondent attacks said allegation that said Fisher counterclaimed for more than the claims against him in a sum in excess of approximately $1,000 by showing that in respondent's sworn petition to set aside the restraining order filed March 20, 1942 respondent had alleged

> "that the so-called counterclaim of Thomas Hart Fisher against this petitioner, set forth in the petition for the restraining order entered herein on February 21, 1942, is without merit" (R. 12).

Respondent also says (p. 13) that Fisher's counterclaim contains "no prayer for affirmative relief" and (p. 14) that the counterclaim "was filed only upon information and belief." No Record references are given, and the Record contains no such evidence.

It will thus be seen that the most that can be said as to Fisher's counterclaim is that petitioner's sworn petition for restraining order filed February 21, 1942 alleged that he is a creditor in a sum in excess of approximately $1,000 (R. 8), and that said counterclaim against respondent is a claim dischargeable in bankruptcy (R. 14); whereas respondent in his sworn petition to set aside restraining order filed March 20, 1942 alleges that said counterclaim of Fisher is without merit.

The Record therefore does not sustain respondent's repeated assertions (except by ignoring petitioner's sworn petition) that Fisher's claim against the alleged bankrupt is not a claim *against* the alleged bankrupt, but is a claim *by* the alleged bankrupt against Fisher.

Moreover respondent completely ignores the pending litigation brought by National Lead Company for approximately $2,500 against the alleged bankrupt upon which suit was pending in The Municipal Court of Chicago. The sworn allegation of the petition for restraining order filed February 21, 1942 with regard to this suit was as follows:

> "Your petitioner further represents that in addition to the aforementioned suit, the National Lead Company of Chicago, Illinois has instituted an action in The Municipal Court of Chicago against the bankrupt herein, in which suit the National Lead Company alleges there is due to it the sum of approximately $2,500. Your petitioner therefore states that said suit should likewise be restrained until the further order of this Court." (R. 9).

None of these allegations regarding the suit of National Lead Company *against* respondent have ever been disputed by respondent either in the bankruptcy court or in the respondent's brief in this Court.

The restraining order entered February 21, 1942 restrained both Fisher and National Lead Company from prosecuting their respective claims against the alleged bankrupt until further order of the bankruptcy court (R. 9).

It follows, therefore, there is no substance to respondent's contention in its brief that the two suits aforesaid were not suits *against* the alleged bankrupt but were suits *by* the alleged bankrupt.

II.

Respondent next contends that an order dissolving a restraining order restraining two actions in the state courts against the bankrupt is "routine" or "perfunctory," and therefore is not appealable (Respondent's Brief, pp. 10-13).

Respondent challenges what it says is petitioner's erroneous assumption "that the Bankruptcy Act of 1938 enlarged the scope of the appellate review" (R. 6-7); and respondent argues that, without such enlargement, orders dissolving restraining orders restraining state court proceedings against an alleged bankrupt would not be appealable.

There is no merit to either assumption. Petitioner argued that under § 24 of the Chandler Act a party to bankruptcy proceedings is entitled to an appeal as a matter of right in both *controversies* and *proceedings* in bankruptcy. (Petitioner's Brief, pp. 5-6, 10-12). This point is conceded by respondent (R. 5-6).

The cases cited in petitioner's brief (pp. 12-19) holding that an interlocutory order dissolving a restraining order restraining state court proceedings is an appealable order were decided under § 129 of the Judicial Code and under

the Bankruptcy Act of 1898. If, therefore, the Chandler Act did not "restrict" the appealability of such orders (and no such claim is made by respondent), then clearly such orders are appealable under § 129 of the Judicial Code and under the Bankruptcy Acts of 1898 and 1938, whether or not the latter "enlarged the scope of appellate review" of the former.

Respondent attempts to distinguish petitioner's cases by contending that in *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379; *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449; *Griesa* v. *Mut. Life Ins. Co.*, 165 Fed. 48; *McGonigle* v. *Foutch*, 51 F. (2d) 455; *Seattle Exchange* v. *Knight*, 46 F. (2d) 34; *General Electric Co.* v. *Marvel Metals Co.*, 287 U. S. 430; *Field* v. *Kansas City Refining Co.*, 296 F. 800; and *Western Union Telegraph Co.* v. *U. S. & M. T. Co.*, 221 F. 545, "the order in substance and effect was an injunction," whereas in the case at bar the order was a mere "restraining order" (Respondent's Brief, pp. 11-13).

Not only is this attempted distinction not made by these cases, but it is squarely refuted by them.

In the *Enelow* case Mr. Chief Justice Hughes held that the grant or refusal of an order of the District Court staying an action at law in a chancery suit, although neither an "injunction" nor a "restraining order" by its terms, was nevertheless to be "considered to be one granting an injunction and thus within the purview of § 129 of the Judicial Code (28 U. S. C. 227) permitting appeal."

In the *Shanferoke* case Mr. Justice Brandeis held in his opinion that an order denying a stay of proceedings in an action at law was in effect an order denying an interlocutory injunction and was therefore appealable.

In the *General Electric Co.* case this Court held that an interlocutory order refusing an injunction was appealable. In that case a counterclaim seeking an injunction was dismissed and the court held the order of dismissal to be appealable under § 129 of the Judicial Code.

In the *Western Union Telegraph Co.* case the very same argument was advanced which is here made, *i.e.*, that an order restraining the prosecution of an action at law was not an injunction, and therefore not appealable. Judge Sanborn for the Eighth Circuit Court of Appeals held that such a restraining order, "in effect and in everything but name, is a temporary injunction" and therefore "falls within the evident meaning of the statute, and is reviewable by appeal."

In the *Griesa* case Judge VanDevanter of the Eighth Circuit Court of Appeals held that "an order staying all further proceedings" in an action at law is understood to be invoking or exercising the injunctive power of the court, "although the technical terms 'restrain and enjoin' be not used."

The *McGonigle* case, which was decided under the Bankruptcy Act of 1898, was to the same effect. Respondent says (pp. 11-12) that this case is not in point because in the *McGonigle* case the persons restrained had "substantially adverse rights from those of the bankrupt estate" whereas in the case at bar "the issue involved" related to "a perfunctory restraining order which might be entered as a matter of course." There is no merit to this attempted distinction. The Circuit Court of Appeals for the Eighth Circuit squarely held that the granting of a stay order staying proceeding in a state court was appealable, even though not technically a temporary injunction.

Respondent attempts to distinguish the *Seattle Curb Exchange* case by stating that in that case the order in the bankruptcy court was entered "after hearing." We were careful to show in our original petition (pp. 3-4) that on March 26, 1942 a full and formal hearing took place before the bankruptcy court, the Honorable John P. Barnes judge presiding, and that as shown by the order entered on that date the trial court examined the petition and was "fully advised as to the facts," although respondent failed to offer proof to support its petition to vacate (R. 15).

The language in the *Field* case quoted by respondent (Respondent's Brief, p. 12) shows that the court was concerned with whether the order was "in effect a temporary injunction" and that the court was helped to its conclusion so finding because the order in that case both restrained and enjoined the state court proceeding and was therefore "in name *also*" an injunction.

Thus we say that petitioner's cases squarely refute the attempted distinction urged by respondent in its brief.

Moreover the cases cited by respondent do not sustain this attempted distinction.

The case of *Hoehn* v. *McIntosh*, 110 Fed. (2d) 199, held that the Chandler Act did not extend the scope of an appeal from an interlocutory order permitting the sale of certain property. This had been the rule under the prior bankruptcy acts and the case was, therefore, properly decided. The decision had no bearing upon an order in the bankruptcy court restraining proceedings in the state court.

The case of *In Re National Finance & Mortgage Corp.*, 96 Fed. (2d) 74, likewise involved the right of the trustee

to sell real estate and was therefore not in point. It does appear that in that case the court attempted to distinguish the appealability of *restraining orders* from the appealability of *injunction orders* under § 129 of the Judicial Code. Whether such a distinction has any merit in connection with the sale of real estate we deem irrelevant to the issues in this case as to an order staying, restraining, or enjoining state court proceedings.

The case of *In Re Chotiner*, 218 Fed. 813, also involved an order of the District Court reversing an order of the referee confirming a sale of the bankrupt's property, the effect of which was to leave the property still in the hands of the trustee. Such an order might readily be unappealable without in any way affecting the appealability of the order in the case at bar.

We conclude that there is no merit to respondent's attempted distinction between "staying" or "restraining" orders on the one hand, and "injunction" orders on the other, where the issue relates to the staying of state court proceedings pending adjudication in the District Court.

III.

Respondent's final point is that § 11 of the Chandler Act making mandatory the restraining of state court proceedings against the bankrupt pending adjudication or dismissal of the bankruptcy petition is "for the sole benefit of the alleged bankrupt" and "may be waived by him" (Respondent's Brief, pp. 17-20).

There is no justification in § 11 of the Chandler Act for any such contention. Obviously the sole purpose of the mandatory provisions of the Act is to protect the bankrupt estate for the benefit of its creditors. The reason that ac-

tions against the bankrupt are mandatorially stayed prior to adjudication and only permissibly stayed after adjudication is that prior to adjudication there is no trustee in bankruptcy to protect the interests of the creditors. If actions against alleged bankrupts pending adjudication are not stayed, there is nothing to prevent a creditor friendly to the bankrupt from prosecuting an action against him and securing a preference to the disadvantage of all of the other creditors of the estate. It is therefore correct to state that § 11 of the Chandler Act is for the benefit of the bankrupt but utterly incorrect to state that it is for the *sole* benefit of the bankrupt.

Indeed in the case at bar petitioner showed by his sworn petition that if the counterclaim brought by Fisher against the alleged bankrupt were not restrained and enjoined "there is grave and imminent danger that this principal asset of the debtor may be dissipated and wholly lost to this estate" and "if this asset is lost to this estate there will be irretrievable damage incurred to all of the creditors, including your petitioner" (R. 8).

The "danger" and "damage" here referred to was the risk that the litigation of the claims and counterclaims involved in the Fisher litigation might dissipate the entire estate. This is shown by petitioner's allegation (R. 8) that "it is to the best interest of the creditors of this estate that when an adjudication has been entered in these proceedings and a trustee in bankruptcy has been duly elected by the creditors that the said trustee should investigate all of the facts pertaining to this subject matter and that this Court should have jurisdiction in marshalling and collecting the said asset for the benefit of all the creditors." Thus it will be seen that this was the very sort of a case

which § 11 of the Chandler Act was designed to cover; and that unless such state court proceedings as this be stayed, the bankrupt's estate and all of the creditors interested therein would or could suffer irretrievable injury as plaintiff's sworn petition alleged.

Respondent's citations (Respondent's Brief, pp. 18-20) are not in conflict with the foregoing conclusion. The text writers and the cases there cited show that a bankrupt who fails to interpose his discharge in bankruptcy in a state court proceeding resulting in a judgment against the bankrupt following his discharge is deemed to have waived the benefits of § 11 of the Chandler Act. The quotation from Remington on Bankruptcy, volume 7, § 3467 is part of Chapter LIII dealing with "Effect of Discharge"; and the quotations from 8 Corpus Juris Secundum, pp. 1366 and 1369, also relate to the bankrupt's opportunity to "plead or set up his discharge."

In the case of *Johnson Dry Goods Co.* v. *Drake*, 121 So. 402, the suit against the bankrupt was already in the Supreme Court of Alabama when the bankrupt, who was the appellee, was adjudicated. The trustee in bankruptcy declined to intervene or defend for the bankrupt in that stage of the proceedings; and the court cited *Boynton* v. *Ball*, 121 U. S. 457 in support of the proposition that the bankrupt might waive his right to interpose his discharge, at the same time deciding the appeal in favor of the bankrupt.

In *Craig* v. *Cameron*, 108 S. E. 828, it was held that the bankrupt did not waive his right to a permanent injunction under § 11 of the Chandler Act, where he obtained his final discharge after judgment against him in the trial court.

In *Hamilton* v. *First State Bank of Garrison*, 220 N. W. 644 the bankrupt was allowed a perpetual stay where his discharge was granted after the judgment was rendered.

In *In Re S. W. Straus & Co., Inc.*, 6 Fed. Supp. 547, the court held that the purpose for which the suit in equity was brought by third parties, after the bankruptcy proceeding was filed but prior to adjudication, was not to recover a provable debt against the bankrupt estate, but was primarily to secure relief against property not belonging to the bankrupt deposited with third persons. At the time the stay was sought the bankrupt had not even been served with process; and the District judge held that such a suit would not interfere with the jurisdiction of the bankruptcy court and was moot until the bankrupt should be served with process.

In *In Re Hoey Tilden & Co.*, 292 Fed. 269, Judge Learned Hand held that the suit in the state court was not to establish a provable debt against the bankrupt estate, but was to establish a trust in specific property and "that such an action has nothing whatever to do with claims *in personam* against the bankrupt, *i.e.*, with any 'debts' ". Another action was a claim for money had and received against the bankrupt which was a dischargeable debt; and as to this claim the district judge held that the bankrupt might get a stay, but not the receiver of the bankrupt's property, because the receiver was only interested in protecting the property in his hands and not in protecting the bankrupt against suits *in personam*. The judge also said (page 271):

> "The judgment if obtained would not be a liquidation of the claim against the estate, which has no interest in the action. Therefore the receiver's motion is denied so far as concerns that suit."

It is to be noted that none of the cases cited by respondent were decided in the Circuit Courts of Appeals. For the reasons indicated they have no hearing upon the issue as to the right of the petitioning creditor to move in the bankruptcy court for a mandatory order under § 11 of the Chandler Act upon a showing of irretrievable damage and danger that the debtor's estate might be dissipated and wholly lost if the restraining order prayed be not entered.

CONCLUSION.

Respondent makes no mention of the failure of the Circuit Court of Appeals for the Seventh Circuit to consider the merits of the appeal. If the order appealed from were appealable, clearly the Circuit Court of Appeals was in error in dismissing it upon its own motion "for lack of jurisdiction" (R. 22). Clearly, also, the Circuit Court of Appeals should have granted petitioner's motion for a supersedeas, for a stay of the mandate, and for a stay injunction pending this appeal (R. 22-9).

It is earnestly submitted that the Circuit Court of Appeals should have granted the litigants the right to be heard upon the issue of its jurisdiction, and should not have dismissed the appeal peremptorily upon its own motion. Petitioner has never had his day in court in the Circuit Court of Appeals upon this question. Having so disposed of the appeal without granting petitioner any right to be heard upon the question of jurisdiction, the Circuit Court of Appeals should surely have granted the petitioner the right to a supersedeas or should have stayed the mandate or itself entered a stay injunction pending the appeal of this Court.

It is respectfully submitted that the order of the Circuit Court of Appeals for the Seventh Circuit should be reversed and the cause remanded to the District Court in Bankruptcy, with discretion to enter an order staying or restraining the two state court proceedings as required by the mandatory provisions of §11 of the Bankruptcy Act of 1938.

Respectfully sumitted,

LEWIS E. PENNISH,
Counsel for Petitioner.

THOMAS S. MCCABE,
Of Counsel.